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MEMORANDUM

TO: Joint Legislative Oversight Committee Members on HHS
Local CFAC Chairs
NC Council of Community Programs
County Managers
State Facility Directors
LME Board Chairs
Advocacy Organizations
MH/DD/SAS Stakeholder Organizations

Commission for MH/DD/SAS
State CFAC
NC Assoc. of County Commissioners
County Board Chairs
LME Directors
DHHS Division Directors
Provider Organizations
NC Assoc. of County DSS Directors

FROM: Michael Watson

Beth Melcher

SUBJECT: Special Implementation Update #99: Treatment of Information Made Confidential by
N.C.G.S. §122C

Introduction

There are several legal sources that protect information relating to care, treatment, and habilitation of persons with Mental Illness (MI), Intellectual or Developmental Disabilities (IDD), and Substance Abuse (SA) issues. This memorandum is concerned largely with N.C. General Statutes (N.C.G.S.) Chapter 122C. Reference is also made to the privacy protections of the Health Insurance Portability and Accountability Act (HIPAA) in cases where N.C.G.A. Chapter 122C refers to HIPAA.

Note: Facilities that accept federal support and provide treatment for substance abuse must also comply with the federal law and regulations commonly referred to as 42 CFR 2.1 et seq. The SA regulations are generally more restrictive than N.C.G.S. Chapter 122C and the exceptions to confidentiality found in N.C.G.A. Chapter 122C do **not** apply to the restrictions on disclosure for SA treatment. **All the state-operated hospitals and the Alcohol and Drug Abuse Treatment Centers (ADATCs) fall under—and must comply with—42 CFR 2.1 et seq.**

It is a crime for any person to disclose confidential information to someone who is not authorized to receive confidential information (N.C.G.S. 122C-52).

Confidential information is:

“any information, whether recorded or not, relating to an individual served by a facility that was received in connection with any function of the facility” (N.C.G.S. 122C-3(9)).

The term “facility,” as used in N.C.G.S. Chapter 122C, does not have its ordinary dictionary meaning. Rather, “facility” is defined as:

“any person at one location whose primary purpose is to provide services for the care, treatment, habilitation, or rehabilitation” of persons with MI, IDD, or SA (N.C.G.S. 122C -3(14)).

Note that a sole practitioner can be a “facility” under this statute. A bricks and mortar practice area is not required. A mental health worker who makes home visits can be a “facility.”

The definition of confidential information is very broad. The simple fact that a person has received treatment is protected because that information relates to an individual and is connected with a function of the facility. Note that confidential information does not stop being confidential just because a client dies.

Unlike some other statutes—such as HIPAA—N.C.G.S. Chapter 122C does not automatically allow a person who legitimately (or illegitimately) receives confidential information to re-disclose. Also, while HIPAA applies only to covered entities, N.C.G.S. Chapter 122C applies to everyone who has confidential information.

The general rule is that any information received in connection with serving a client may not be disclosed unless N.C.G.S. Chapter 122C has an exception for that type of disclosure. There are also exceptions under state and federal law that allow disclosures to advocates—internal and external. These exceptions are not addressed in this bulletin.

Exceptions under N.C.G.S. Chapter 122C

A. GENERAL

Under N.C.G.S. Chapter 122C otherwise confidential information:

1. **May be shared with anyone** if consent has been granted by the client or a legally responsible person.

In such cases, consent must be:

- in writing
- for a specified time, and,
- subject to revocation (N.C.G.S. 122C-53).

A **legally responsible person** is defined in N.C.G.S. 122C-3(20) as:

For adults:

- a) a guardian of an adult who has been legally adjudicated incompetent;
- b) a health care agent named in a valid power of attorney for an adult who is incapable of making health care decisions per N.C.G.S. 122C-72(4) and who has **not** been adjudicated as incompetent.

For minors:

- a) a parent, guardian, or person standing in loco parentis, or person who has been granted specific authority by law or in a custody order to consent for medical care, including psychiatric care.

Confidential information may also be shared in the following circumstances. It:

2. **May be given to the client** except when the attending physician determines such information would be injurious to client (N.C.G.S. 122C-53).
3. **May be given pursuant to a court order compelling disclosure** (N.C.G.S. 122C-54).
4. **May be used and disclosed by HIPAA-covered entities or business associates** in accordance with the Privacy Regulations of HIPAA, 45 CFR Part 164, Subpart E. Such disclosure is allowed when the confidential information was received in accordance with one of the provisions of N.C.G.S. 122C-53 through 122C-56.

B. SPECIAL PROVISIONS FOR CARE AND TREATMENT

Under N.C.G.S. Chapter 122C otherwise confidential information may be given for care and treatment, per the provisions of N.C.G.S. 122C-55, as specified below. In such cases, confidential information:

1. **May flow from any facility to any facility** when necessary to coordinate care, treatment or habilitation (N.C.G.S. 122C-55(a)).
2. **May flow from any facility to the Secretary of the Department of Health and Human Services (DHHS) and from the Secretary to any facility** when necessary to conduct quality assurance (QA)

and quality improvement (QI) or coordinate care, treatment or habilitation. For purposes of this exception, a Local Management Entity (LME) is considered to be a facility, and Community Care of North Carolina (CCNC) is the same as the Secretary (N.C.G.S. 122C-55(a1)).

3. **May be shared between area facilities (facilities operated by or that have a contract or a Memorandum of Understanding (MOU) with an LME), state facilities, and University of North Carolina at Chapel Hill (UNC) psychiatric services** when necessary to collect payment, determine eligibility or coverage, coordination of benefits, determine cost-sharing amounts, process claims, utilization management (UM), utilization review (UR), etc. (N.C.G.S. 122C-55(a2)).
4. **May flow from area facilities, state facilities, or UNC psychiatric service to the Secretary of DHHS** when necessary to establish initial eligibility for benefits; determine continued eligibility, and to get paid for services rendered to client (N.C.G.S. 122C-55(a3)).
5. **May be exchanged between LME's and area facilities** when disclosure is necessary to develop, manage, monitor, or evaluate an LME's provider network (N.C.G.S. 122C-55(a4)).
6. **May be shared by one area facility and any other area facility** in order to determine if an applicant for services (a person who has contacted the LME asking for services) is eligible for area facility services (N.C.G.S. 122C-55(a5)).
7. **May be disclosed by CCNC if the information was acquired pursuant to N.C.G.S. 122C-55 (a1) and provided to an entity that has a written agreement with CCNC** when necessary to do QA, QI, or coordinate care, treatment and habilitation. These disclosures must also comply with the privacy requirements of HIPAA (N.C.G.S. 122C-55(a6)).
8. **May be disclosed by facilities to any HIPAA-covered entities and business associates in accordance with HIPAA**, but not for discriminatory purposes, when necessary to conduct QA and QI or coordinate care, treatment or habilitation (same criteria as N.C.G.S. 122C-55(a1)). **This is waived if the client or the legally responsible person objects in writing. The client or legally responsible person must be informed of right to object before the information is disclosed** (N.C.G.S. 122C-55(a7)).
9. **May be disclosed by a facility, physician, or any other person responsible for management, evaluation, or treatment of outpatient committee** to carry out outpatient commitment responsibilities (N.C.G.S. 122C-55(b)).
10. **May flow from a facility to the Division of Adult Correction (Division), and from the Division to a facility**, in response to inquiries by the Division regarding an inmate who needs MI/DD/SA treatment or when an inmate seeks such treatment from a facility. **Inmate consent is not required. Disclosure is permitted even if the inmate objects.** (N.C.G.S. 122C-55(c)).
11. **May be shared between a responsible professional and anyone who needs to know** when the responsible professional believes there would be imminent danger to the health or safety of the client or someone else, or the likelihood of commission of a felony or violent misdemeanor (N.C.G.S. 122C-55(d)).
12. **May be shared between responsible professionals and providers of emergency medical services to the client** when necessary to provide emergency medical services to the client (N.C.G.S. 122C-55(e)).
13. **May be provided by state facilities to the Secretary of DHHS** to maintain an index of clients served at state facilities used only if necessary for appropriate and effective evaluation, care and treatment of the client (N.C.G.S. 122C-55(e1)).
14. **Responsible professional may disclose the advance instruction or confidential information from the advance instruction to a physician, psychologist or any qualified professional** when necessary to give effect to an advance instruction for MI treatment (N.C.G.S. 122C-55(e2)).
15. **May be provided by a facility to a provider of support services** when the information is needed to provide support services and there is a written agreement not to further disclose and to safeguard the confidential information (N.C.G.S. 122C-55(f)).
16. **May be disclosed to state local or federal agencies without client consent, except as provided for in N.C.G.S. 122C-55(g1) and (a3)** when there is reason to believe that a client is eligible for benefits through a governmental agency. **Consent is required after establishment of services** (N.C.G.S. 122C-55(g)).

17. **May be disclosed by state facilities (psychiatric hospitals, developmental disability (DD) centers, and ADATC's)** to anyone to collect payment for cost of care, treatment, or habilitation (N.C.G.S. 122C-55(g1)).
18. **May be disclosed by a facility to its own employees, consultants, volunteers, and students** to carry out responsibilities to care, treat, or habilitate (N.C.G.S. 122C-55(h)).
19. **May be disclosed by a responsible professional to the physician or psychologist who referred the client to the facility** upon specific request of referring physician or psychologist (N.C.G.S. 122C-55(i)).

C. SPECIAL PROVISIONS FOR NEXT OF KIN AND FAMILY MEMBERS WITH LEGITIMATE THERAPEUTIC ROLES

Under N.C.G.S. Chapter 122C, confidential information may be given in the following cases upon request of next of kin or other family member who has a **legitimate therapeutic role** in the therapeutic services offered, or other person designated by the client or the legally responsible person.

Providers must use caution to ensure they know the identity of the person requesting information and that such persons have a therapeutic role in the services offered.

10A NCAC 26B.0103 defines a person playing a therapeutic role as someone who, in the judgment of the responsible professional (as defined in [G.S. 122C-3](#))—and after considering the opinion of the client—currently provides, or has within the past 12 months preceding the current hospitalization, provided substantial time or resources in the care of the client.

In such cases, the sharing of confidential information is allowed in the following circumstances:

1. (***With** client or legally responsible person consent.*) A responsible professional must provide the requestor with: notification of client's diagnosis, prognosis, medications, dosages, side-effects, and client progress. Client can consent orally in front of a witness; otherwise the request must be in writing and must be noted in the patient's medical record (N.C.G.S. 122C-55(j)).
2. (***Without** client or legally responsible person consent.*) The responsible professional must provide the requestor with: notice of admission to the facility, transfer to another facility, client's decision to leave the facility against medical advice (AMA), discharge, and referrals/appointment information post-discharge (N.C.G.S. 122C-55(k)).
3. (***This bullet does not include designee of legally responsible person.***) The responsible professional must provide the requestor with information not covered by N.C.G.S. 122C-55(j) and (k), when the requestor has identified the intended use, and when client or legally responsible person has consented in writing, and when responsible professional determines disclosure is to the client's therapeutic benefit. Responsible professionals **must refuse the request** when the requested information would be detrimental to the therapeutic relationship; or if next of kin, family member, or designee has no legitimate need for the requested information. (N.C.G.S. 122C-55(l)).

As a reminder, all Medicaid-enrolled providers billing for services are expected to adhere to all Medicaid and Health Choice policies and guidelines and are expected to stay informed about any changes. Medicaid Bulletins are published monthly and may include articles not found in the Implementation Updates. Medicaid Bulletins can be found at: <http://www.ncdhhs.gov/dma/bulletin/index.htm>.

Unless noted otherwise, please email any questions related to this Implementation Update to ContactDMH@dhhs.nc.gov.

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